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Virginia Poultry Federation Comments on Draft Chesapeake Bay TMDL

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Water Docket
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

RE: EPA-R03-OW-2010-0736 (Draft Chesapeake Bay TMDL)

Virginia Poultry Federation (VPF) is pleased to comment on the draft Chesapeake Bay TMDL (draft TMDL) published in the Federal Register by the U.S. Environmental Protection Agency (EPA) on September 22, 2010.

VPF is a nonprofit trade association, founded in 1925, that represents the poultry and egg industry in Virginia. VPF's members include poultry processors, poultry farmers, and allied companies that provide goods and services to the poultry industry.

The poultry industry, which has an overall economic impact in Virginia in excess of $1.5 billion, generates significant farm income that helps keep farmland in production and slow conversion of farmland for other less environmentally friendly uses. The poultry industry employs about 10,000 people in Virginia and supports the livelihood of nearly 1,100 family farms that raise chickens, turkeys or eggs.

Poultry Industry Environmental Stewardship

VPF believes that the Chesapeake Bay is indeed a tremendous natural resource. It deserves our stewardship – but not in the heavy-handed, federally driven, regulatory manner outlined Executive Order 13508, various EPA communications, and the draft TMDL.

Virginia's poultry industry has been a responsible and proactive environmental steward on a voluntary basis and through compliance with existing government regulations. The industry has long been part of the solution to a cleaner Bay and local waterways. Please consider the following:

- In 1995, Virginia's poultry industry received a "Friend of the Bay" award from the Commonwealth of Virginia for its voluntary initiative to implement nutrient management plans (NMPs) on all Valley poultry farms by the year 2000, a goal largely achieved.

- VPF estimates at least 80 percent of poultry producers in the Shenandoah Valley have constructed sheds for storing poultry litter before it is utilized. (Those with or without sheds must store litter according to state regulatory criteria.)

- Feed management:

  - ✓ Phytase phosphorus reduction enzyme incorporated in poultry feed mills, resulting in a more than 25 percent, on average, reduction in phosphorus in Virginia poultry litter.

- Collaboration:

  - ✓ VPF participates in the Virginia Waste Solutions Forum, a collaboration of agriculture, environmental groups, academia, government agencies, and others that have worked since 2004 to identify economically viable solutions for surplus animal manure.

  - ✓ VPF was a founding member of the Shenandoah Valley Pure Water Forum, another group of diverse interests working collaboratively toward improved water quality.

  - ✓ VPF participated in a coalition of agricultural and conservation groups that worked successfully together to obtain increased funding for the Virginia Agricultural BMP cost-share program.

Aside from the above voluntary efforts, Virginia's poultry industry is already heavily regulated. In 1999, the Virginia General Assembly enacted the Poultry Waste Management Program (House Bill 1207). This law charged the State Water Control Board with developing a regulatory program requiring a general permit, incorporating a state-approved, phosphorus-based, nutrient management plan and mandating adequate waste storage, for growers. The program requires tracking and accounting of litter transferred off poultry farms. Growers with 20,000 or more broilers or laying hens or 11,000 or more turkeys were required to obtain a state-approved nutrient management plan and file for the general permit by October 1, 2001. This is far below the threshold at which federal regulations define a "Large" CAFO and captures the vast majority of poultry farms in Virginia.

Furthermore, the State Water Control Board recently adopted amendments to the Virginia Poultry Waste Management Program to impose additional regulatory requirements upon litter transporters and non-poultry farmers that receive poultry litter for use on their farm. The regulation now imposes enforceable requirements governing "end-users'" land-application and storage of poultry litter.

In addition, poultry processors are being required, with no cost-share, to spend millions of dollars on wastewater treatment plant and storm water upgrades. New permits must meet close to "limits of technology" reductions for total nitrogen, in some cases reducing nitrogen by 95-99 percent at a cost of up to $3 million per plant. This is on top of previous reductions in phosphorus to limits as low as 0.1 mg/liter that cost upwards of $2 million for some plants.

As you can see, Virginia's poultry industry has been a responsible and proactive environmental steward on a voluntary basis and through compliance with government regulations. It is important that these activities and programs are considered in Bay modeling and given full credit in Virginia's Bay cleanup strategies.

Legal and Policy Issues

The draft TMDL exceeds the authority granted to EPA by Congress. The Clean Water Act (CWA) prescribes specific requirements and procedures for developing TMDLs for impaired waters. EPA is not following these procedures nor adhering to these requirements. The CWA does not give EPA any authority to require or implement TMDL implementation plans as the agency is attempting to do. The CWA does not give EPA authority to mandate state actions under threat of federal sanctions as the agency is attempting to do. The CWA requires states to develop TMDL for waters that fail to meet water quality standards. The CWA authorizes EPA to adopt a TMDL for an individual water body or segment *only* after the agency has determined that a state has failed to develop a TMDL for that particular water body or segment. In this regard, the draft TMDL does not adhere to the CWA.

Furthermore, EPA has not followed appropriate administrative procedure in development of the Bay TMDL. A mere 45 days is inadequate and inappropriately brief to receive public comment on the massive, complex materials posted by EPA in the *Federal Register* on September 24. The draft TMDL document is 370 pages, with 22 appendices consisting of 1,672 pages. It contains complex, highly technical information. It is impossible for citizens to analyze this volume of material and assess its impact within 45 days. This duration thereby effectively denies the public adequate opportunity to comment.

But even if the comment period were longer, this draft TMDL, as massive as it is, also does not properly document for public consideration the basis for its composition. The draft TMDL is based on a model. The model is fed by a secondary modeling tool called Scenario Builder, which provides land use assumptions. EPA has failed to publically disclose and allow public comment on the efficacy of Scenario Builder. This is also contrary to federal administrative procedure law.

Furthermore, the agency admits to flaws in the model, which it says will be corrected later. Yet the agency has published a draft TMDL with federal backstops and demanded submittal of state WIPs, based on this flawed model. If the model is flawed, it will not reflect reality. If the model does not reflect reality, then the resulting federal actions are arbitrary and capricious under federal administrative procedures law.

Aside from EPA's failure to follow the Clean Water Act with respect to development of a Chesapeake Bay TMDL, the agency's policy of threatening TMDL "backstops" against federally permitted point sources for perceived WIP deficiencies is also counterproductive and poor public policy. The proposed backstops call for greater nutrient reductions at municipal wastewater treatment facilities and greater regulation of animal feeding operations (AFO's), this despite limited authority to require NPDES permits for AFOs and the fact that both wastewater plants and poultry AFO's in Virginia have already complied with stringent regulatory requirements at considerable expense.

Chesapeake Bay Model Assumptions

As discussed earlier, VPF is concerned about the accuracy of EPA's Scenario Builder model and the latest Chesapeake Bay Model. It is essential that the assumptions in these tools are correct so that solutions can be accurately applied to problems. We have little confidence about the assumptions and science underlying the model. Part of the problem is a lack of transparency in EPA's documentation of model inputs. We are unaware of how or if EPA has used scientific methods or whether any peer review of the modeling tools has occurred.

Voluntary practices must be counted in the Bay Model, and the model must utilize up-to-date animal production data and accurately incorporate current management practices. This is not currently the case.

In the case of animal feeding operations (AFOs), the latest model still assumes that 15 percent of animal manure is lost during storage. What is the basis for such an assumption? We challenge the modelers to provide scientifically based documentation that 15 percent of poultry litter in storage on poultry farms is lost to the environment during storage and what, if any, quantities of nitrogen and phosphorus contained in such litter enters waters of the U.S. In Virginia, poultry litter is regulated and managed in a manner that makes us seriously question this assumption.

The earlier model (version 4.3) utilized outdated agricultural census data and, due to the lack of complete documentation in version 5.3 and in Scenario Builder, it is not possible to currently tell what agricultural census data are being used. Virginia's poultry industry has contracted in the past 15 years. There is also a growing trend within the industry to reduce the frequency of total house cleanouts. Instead producers are employing partial cleanouts or "decaking" over longer durations. Decaking consists of removing roughly the top third of litter from the poultry house and leaving the reminder for the next grow-out cycle. This, combined with the fact the industry has declined in size suggests that actual tonnages of land applied litter may be substantially lower than model estimates.

Finally, it is important for EPA to obtain all applicable data on poultry litter transport and appropriately factor it into modeling. We have asked the state to supply the modelers with the data. Now that Virginia has adopted its new "end-user" regulations, all litter must either be applied onsite of a poultry farm according to a phosphorus-based nutrient management plan or

managed to account for phosphorus buildup and other environmental risk factors if transferred offsite. Virginia must get credit for these BMPs in the model. This is imperative, as the simplistic approach being used by the modelers incorrectly assumes excess nutrients are transferred to neighboring counties once the nutrients have been applied at the appropriate agronomic rate to crops and pasture within the county in which they were generated.

It is critical that EPA and state agencies work closely with affected industries to ground-truth the assumptions used in the model. We welcome any such opportunities.

In summary, the draft TMDL is based on an inaccurate model. The model does not reflect reality. The resulting TMDL, therefore, it is arbitrary and capricious under the federal administrative procedure law.

Cost and Economic and Social Impacts

Tens of billions of dollars have already been spent on efforts to improve the Chesapeake Bay. The poultry industry has been a willing and proactive steward of the environment and allocated millions of dollars toward this objective, many directly related to the Bay restoration. The industry will continue to be a responsible environmental steward, guided by scientific research, technological advancements, and sensible consideration of economics.

Unfortunately, in addition to being beyond the scope of the law, the draft TMDL and associated mandates will exact an enormous economic impact at a time when our economy is already suffering. Poultry processors and farmers operate on thin margins, and cannot bear the burden of substantial new regulatory costs. Such costs could make the Bay region uncompetitive for poultry production. Causing the poultry industry to shift production to other areas of the nation or oversees would be bad for the Bay. The industry currently provides substantial farm income that helps maintain well-managed farmland, which is widely recognized as a one of the best land-uses for maintaining water quality. Jeopardizing the economic viability of the poultry industry will only lead to more impervious surfaces that will be counterproductive to Bay improvement goals.

EPA has not conducted an adequate assessment of its proposals' economic impacts. The agency should not proceed with its proposals without full analysis and consideration of the economic impacts.

Recognizing Successful State Programs

Rather than exceed the limits of its regulatory authority, EPA should recognize the efficacy of state programs. For example, the Virginia Poultry Waste Management Act and regulations are equally and in some cases more efficacious for water quality protection than federal CAFO

permits. Requiring more farmers to be covered under federal CAFO permits only burdens farmers with more paperwork and does nothing for water quality.

Conclusion

Virginia has identified some priority agricultural BMPs and directed cost-share and other incentives toward their adoption. Rather than new regulatory mandates, the most good can be achieved through consistent and reliable cost-share funding and technical assistance through local conservation agencies. We ask EPA to reconsider its perilous course and allow states to chart a path forward that balances the universally shared desire to improve the condition of the Bay while preserving state prerogatives and avoiding detriment to agriculture and Virginia's economy generally.

Please let me know if you would like additional information. Thank you for your consideration of these comments.